LEE CHOON HEI v. PUBLIC BANK BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
BADARIAH SAHAMID JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEALS NO: W-02(IM)(NCC)-1482-09-2015 &
W-02(IM)(NCC)-1523-09-2015]
22 MARCH 2017

PARTNERSHIP: *Suits by and against partnerships – Action against firm – Solicitor from firm's branch acted for bank in loan transaction with third party – Third party defaulted in payment – Bank unable to proceed with foreclosure proceedings since charge on property in favour of bank discharged without bank's knowledge and consent – Judgment obtained against firm for damages suffered by bank – Whether former partner of firm liable at material date when discharge of charge took place – Whether writ of summons ought to be served on former partner of firm – Whether High Court Judge erred in failing to direct that liability of former partner be tried in full*

Paul Cheah & Associates ('defendant') was a firm of practicing solicitors with its main or head office in Kuala Lumpur and had a branch office in Subang Jaya. *Vide* a branch partnership agreement ('the agreement') dated 14 July 2006 entered into between Paul Cheah as the principal owner of the defendant, Lee Choon Hei ('appellant') was made a partner of the defendant from 1 July 2006 till 30 June 2008. Frankie Tan was the solicitor in charge of the Subang Jaya branch. Public Bank Berhad ('plaintiff') appointed the defendant to attend to the legal documentations involving a fixed loan facility offered to Polyidaman Sdn Bhd ('Polyidaman') to refinance a factory. As a form of security, Polyidaman charged the factory to the plaintiff. The defendant's Subang Jaya branch handled the conveyancing transaction. On or about 25 November 2008, Polyidaman defaulted in the repayment of its loan to the plaintiff. While preparing for the foreclosure proceedings, it came to the plaintiff's knowledge, *inter alia*, that the plaintiff's charge was discharged by way of Form 16N which contained a forged signature of the plaintiff's officer and was witnessed by the same Frankie Tan on 12 October 2006. As a result, the plaintiff was unable to commence foreclosure proceedings. Based on the claim for negligence, fraud caused by forgery and for breach of contract, the plaintiff commenced an action in the High Court in 2011 and obtained judgment against the defendant ('the judgment'). The plaintiff filed encl. 71 for leave to execute the judgment *vide* a bankruptcy action pursuant to O. 77 r. 5(4) of the Rules of Court 2012 ('ROC') against the partners of the defendant, including the appellant. The appellant, on the other hand, filed encl. 91 to strike out encl. 71. The appellant, argued, amongst others, that (i) the fixed loan transaction was done before the appellant joined the defendant; (ii) the partnership between Paul Cheah and the appellant was dissolved in June 2008; and (iii) the notice of demand was not served on the

A appellant before legal actions were commenced against the defendant. The High Court Judge allowed encl. 71 and dismissed encl. 91. Two appeals were filed herein in respect of the decisions for each application which were heard together. The issues that arose for determination, *inter alia*, were (i) whether there was non-compliance with O. 77 r. 3(2) of the ROC; (ii) whether the
B High Court Judge erred in using the date of 31 December 2013, which was the date of closure of the defendant, instead of 30 June 2008 which was the date the appellant ceased to be a partner of the defendant in accordance with O. 77 r. 3(2) of the ROC; (iii) whether the writ of summons ought to have been served on the appellant; and (iv) whether the High Court Judge erred
C in failing to direct that the liability of the appellant be tried in full to enable all matters in dispute to be decided based on O. 77 r. 5(5) of the ROC.

Held (dismissing appeals with costs)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

D **(1)** Order 77 r. 3(2) of the ROC states that 'where a partnership has, to the knowledge of the plaintiff, been dissolved before an action against the firm is begun, the writ by which the action is begun must be served on every person within the jurisdiction sought to be made liable in the action'. The appellant ceased to be a partner of the defendant in June 2008; the defendant itself was only dissolved in 2013. When the suit was
E filed by the plaintiff in 2011 the defendant had entered appearance and defended itself at the trial. Therefore, O. 77 r. 3(2) only applied when the defendant was dissolved when its last two partners ceased to be partners on 31 December 2013. The argument that the term 'partnership' in O. 77 must be distinguished from the term 'firm' was
F without merit. The assertion that a partnership can be dissolved when one partner leaves the partnership or when a new partner joins the partnership was unsustainable. (paras 10 & 11)

(2) Order 77 r. 5(5) provides that '… where that person disputes liability, the court may order that the liability of that person be tried and
G determined in any manner in which any issue or question in any action may be tried and determined'. This must be read together with O. 77 r. 1 and r. 5(4). The only thing that the applicant needs to show is that the subject of the application 'is liable to satisfy the judgment or order as being a member of the firm'. It followed that the plaintiff did not need
H to prove all over again all the causes of action that were merged in the judgment against the defendant because the nexus between the appellant and the judgment was the all-important fact that the appellant was a member of the defendant at the time when the plaintiff's cause of action accrued against the defendant. Thus, as soon as the plaintiff showed that
I the appellant was a member of the defendant when the cause of action accrued, the appellant was liable. (paras 16 & 17)

(3) The invalid act of Frankie Tan in witnessing the forged signature on Form 16N on 19 October 2006 as partner of the defendant and the defendant's action in presenting the executed Form 16N for registration on 1 November 2006 directly caused the discharge of the plaintiff's charge over the factory. Therefore, the relevant dates when the cause of action of the plaintiff arose against the defendant were 19 October 2006 and 1 November 2006. Since the appellant did not dispute that he was a partner on those dates, the prerequisites for leave as set out in O. 77 r. 5(4) of the ROC had been satisfied and the appellant must accordingly be liable to the plaintiff for the judgment debt. (para 20)

Bahasa Malaysia *Headnotes*

Paul Cheah & Associates ('defendan') adalah sebuah firma guaman dengan pejabat utamanya di Kuala Lumpur dan cawangannya di Subang Jaya. Melalui perjanjian perkongsian cawangan ('perjanjian') bertarikh 14 Julai 2006 yang ditandatangani antara Paul Cheah sebagai pemilik utama defendan, Lee Choon Hei ('perayu') dijadikan rakan kongsi defendan dari 1 Julai 2006 hingga 30 Jun 2008. Frankie Tan adalah peguam cara yang menjaga cawangan Subang Jaya. Public Bank Berhad ('plaintif') melantik defendan untuk menguruskan dokumentasi undang-undang yang melibatkan kemudahan pinjaman tetap yang ditawarkan kepada Polyidaman Sdn Bhd ('Polyidaman') untuk pembiayaan semula sebuah kilang. Sebagai cagaran, Polyidaman menggadaikan kilang tersebut kepada plaintif. Cawangan Subang Jaya defendan mengendalikan urus niaga pemindahhakkan tersebut. Pada atau sekitar 25 November 2008, Polyidaman memungkiri pembayaran balik pinjamannya kepada plaintif. Semasa bersiap sedia untuk memulakan prosiding penyitaan, plaintif mendapat tahu, antara lain, bahawa gadaian plaintif telah dilepaskan melalui Borang 16N yang mengandungi tandatangan palsu pegawai plaintif dan disaksikan oleh Frankie Tan pada 12 Oktober 2006. Akibatnya, plaintif tidak dapat memulakan prosiding penyitaan. Berdasarkan dakwaan kecuaian, penipuan yang disebabkan oleh pemalsuan dan pelanggaran kontrak, plaintif memulakan tindakan di Mahkamah Tinggi pada tahun 2011 dan memperoleh penghakiman terhadap defendan ('penghakiman'). Plaintif memfailkan lampiran 71 untuk kebenaran melaksanakan penghakiman dengan tindakan kebankrapan menurut A. 77 k. 5(4) Kaedah-Kaedah Mahkamah 2012 ('KKM') terhadap rakan-rakan kongsi defendan, termasuk perayu. Perayu, sebaliknya, memfailkan lampiran 91 untuk membatalkan lampiran 71. Perayu menghujahkan, antara lain, bahawa (i) transaksi pinjaman tetap dilakukan sebelum perayu menyertai defendan; (ii) perkongsian antara Paul Cheah dan perayu dibubarkan pada bulan Jun 2008; dan (iii) notis tuntutan tidak disampaikan kepada perayu sebelum tindakan undang-undang dimulakan terhadap defendan. Hakim Mahkamah Tinggi membenarkan lampiran 71 dan menolak lampiran 91. Dua rayuan difailkan berkenaan keputusan bagi setiap permohonan yang didengar bersama. Isu-isu yang dibangkitkan untuk

pertimbangan, antara lain, adalah (i) sama ada terdapat ketidakpatuhan A. 77 k. 3(2) KKM 2012; (ii) sama ada Hakim Mahkamah Tinggi terkhilaf dalam menggunakan tarikh 31 Disember 2013, iaitu tarikh penutupan defendan, dan bukannya 30 Jun 2008 yang merupakan tarikh perayu berhenti menjadi rakan kongsi defendan berdasarkan A. 77 k. 3(2) KKM 2012; (iii) sama ada writ saman sepatutnya disampaikan kepada perayu; dan (iv) sama ada Hakim Mahkamah Tinggi terkhilaf apabila gagal mengarahkan liabiliti perayu dipertimbangkan sepenuhnya untuk membolehkan perkara yang dipertikaikan diputuskan berdasarkan A. 77 k. 5(5) KKM.

Diputuskan (menolak rayuan-rayuan dengan kos)

Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Aturan 77 k. 3(2) KKM menyatakan bahawa 'apabila suatu perkongsian telah, dengan pengetahuan plaintif, dibubarkan sebelum suatu tindakan terhadap firma dimulakan, writ yang mana tindakan dimulakan harus disampaikan kepada setiap orang dalam bidang kuasa yang hendak dijadikan bertanggungjawab dalam tindakan'. Perayu tidak lagi menjadi rakan kongsi defendan pada bulan Jun 2008; defendan hanya dibubarkan pada tahun 2013. Apabila tindakan difailkan oleh plaintif pada tahun 2011, defendan telah memasukkan kehadiran dan mengemukakan pembelaannya semasa perbicaraan. Oleh itu, A. 77 k. 3(2) hanya diguna pakai apabila defendan dibubarkan dan dua rakan terakhirnya tidak lagi menjadi rakan kongsi pada 31 Disember 2013. Hujahan bahawa terma 'perkongsian' dalam A. 77 harus dibezakan dari terma 'firma' adalah tanpa merit. Dakwaan bahawa perkongsian boleh dibubarkan apabila seseorang rakan kongsi meninggalkan perkongsian atau apabila rakan kongsi baru menyertai perkongsian tidak dapat dikekalkan.

(2) Aturan 77 k. 5(5) memperuntukkan bahawa '… jika orang itu mempertikaikan liabiliti, mahkamah boleh memerintahkan liabiliti orang itu dibicarakan dan ditentukan dalam apa jua cara di mana apa-apa isu atau soalan dalam apa-apa tindakan boleh dibicarakan dan ditentukan'. Ini harus dibaca bersama-sama dengan A. 77 k. 1 dan k. 5(4). Satu-satunya perkara yang perlu ditunjukkan oleh pemohon adalah subjek permohonan itu 'bertanggungjawab memuaskan penghakiman atau perintah sebagai ahli firma'. Oleh itu, plaintif tidak perlu membuktikan semula semua sebab-sebab tindakan yang digabungkan dalam penghakiman terhadap defendan kerana pertalian antara perayu dan penghakiman tersebut adalah fakta yang penting bahawa perayu adalah ahli defendan pada masa tindakan plaintif terakru terhadap defendan. Oleh itu, sebaik sahaja plaintif menunjukkan bahawa perayu adalah ahli defendan apabila kuasa tindakan terakru, perayu bertanggungjawab.

(3) Tindakan Frankie Tan yang tidak sah dalam menjadi saksi tandatangan palsu pada Borang 16N pada 19 Oktober 2006 sebagai rakan kongsi defendan dan tindakan defendan dalam membentangkan Borang 16N yang disempurnakan untuk pendaftaran pada 1 November 2006 secara langsung menyebabkan pelepasan cagaran plaintif ke atas kilang tersebut. Oleh itu, tarikh relevan kausa tindakan plaintif terakru terhadap defendan adalah 19 Oktober 2006 dan 1 November 2006. Oleh kerana perayu tidak mempertikaikan bahawa dia adalah rakan kongsi pada tarikh tersebut, prasyarat bagi kebenaran sebagaimana yang dinyatakan dalam A. 77 k. 5(4) KKM telah dipenuhi dan perayu mesti dengan sewajarnya bertanggungjawab terhadap plaintif untuk hutang penghakiman tersebut.

Case(s) referred to:
Kumpolan Kemajuan Raya Sdn Bhd v. Faidz Darus [1996] 1 BLJ 423 HC ***(refd)***
Lim Boon Kiak v. Affin Bank Bhd [2013] 6 CLJ 579 CA ***(refd)***
Lim Chui Lai v. Zeno Limited [1964] 1 LNS 88 HC ***(refd)***
Millenium Medicare Services v. Nagadevan Mahalingam [2013] 9 CLJ 766 HC ***(refd)***
Public Bank Bhd v. Paul Cheah & Associates [2016] 10 CLJ 598 HC ***(refd)***
Rengasamy Pillai v. Comptroller of Income Tax [1970] 1 LNS 139 FC ***(refd)***
S Mariappan v. The Government Of Malaysia [1983] 2 CLJ 124; [1983] CLJ (Rep) 382 FC ***(refd)***
Union of India v. Manohar Lal Narang And Another [1977] 2 All ER 348 ***(refd)***
Wee Wat Neo v. Chop Khoo Aik Seng & Co [1908] SSLR 50 ***(refd)***
Wigram v. Cox, Sons Buckley & Co (1894) QBD 792 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6(3)
Partnership Act 1961, ss. 12, 19(1), 23, 34, 35, 36, 37
Rules of Court 2012, O. 77 rr. 1, 3(2), 5(4), (5)

For the appellant - Baskaran Manikam & KS Tay; M/s Michael Lee & Assocs
For the respondent - Goh Meng Yew & Nur Azwa Fadzil; M/s Iza Ng Yeoh & Kit

[Editor's note: For the High Court judgment, please see Public Bank Bhd v. Paul Cheah & Associates [2016] 10 CLJ 598 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This is an appeal against the decision of the High Court at Kuala Lumpur given on 26 August 2015 in respect of encls. 71 and 91. The High Court had allowed the respondent's application in encl. 71 for leave to execute the judgment dated 30 November 2012 by way of bankruptcy proceedings against the appellant pursuant to O. 77 r. 5(4) of the Rules of Court ("ROC 2012"). The High Court had also dismissed the appellant's

application in encl. 91 to strike off the respondent's application in encl. 71 for leave to execute. Costs were in each case awarded to the respondent. Aggrieved with the decisions, the appellant appealed to this court.

[2] Two appeals were filed in respect of the decisions for each application. The appeals were ordered to be heard together. The appeals were heard on 5 October 2016. After hearing the parties and taking into consideration the written submissions, we dismissed the appeals and affirmed the decision of the High Court. Our reasons for doing so now follow. For convenience the parties will be referred to as they were in the High Court except that the appellant here, Lee Choon Hei, will be referred to as the appellant.

The Salient Facts

[3] The salient facts giving rise to the said applications can be gathered from the judgment as well as the headnotes of the case reported as *Public Bank Bhd v. Paul Cheah & Associates* [2016] 10 CLJ 598. The facts are as follows. The defendant was a firm of practicing solicitors with its main or head office in Kuala Lumpur and had a branch office in Subang Jaya. *Vide* a branch partnership agreement ('the agreement') dated 14 July 2006 entered into between Paul Cheah as the principal owner of the defendant law firm and appellant here, Lee Choon Hei , the latter was made a partner of the firm from 1 July 2006 till 30 June 2008. Frankie Tan was the solicitor in charge of the Subang Jaya branch.

[4] The plaintiff, a licensed bank, appointed the defendant to attend to the legal documentation involving a fixed loan facility offered to Polyidaman Sdn Bhd ('Polyidaman') to refinance a 1 1/2 storey factory. As a form of security, Polyidaman charged the property to the plaintiff. The defendant's Subang Jaya branch handled the said conveyancing transaction. On or about 25 November 2008, Polyidaman defaulted in the repayment of its loan to the plaintiff. While preparing for the foreclosure proceedings, it came to the plaintiff's knowledge that (i) the charge over the property had been discharged from as early as 1 November 2006; (ii) the property was transferred from Polyidaman to one Shahrol; and (iii) the property had been charged by Shahrol to CIMB Bank Bhd on 1 November 2006.

[5] It was subsequently revealed that the plaintiff's charge was discharged by way of Form 16N which contained the forged signature of the plaintiff's officer and was witnessed by the same Frankie Tan on 12 October 2006. The plaintiff, however, argued that it did not have any knowledge about the discharge of the charge and transfer of the property. As a result, the plaintiff was unable to commence the foreclosure proceedings. Based on the claim for negligence, fraud caused by forgery and for breach of contract, the plaintiff commenced an action in the High Court in 2011 and obtained judgment against the defendant ('judgment') for the sum of RM561,483 with interest and cost. The plaintiff filed an application (encl. 71) for leave to execute the

judgment *vide* a bankruptcy action pursuant to O. 77 r. 5(4) ROC 2012 against the partners of the defendant, including the appellant. The appellant, on the other hand, filed encl. 91 to strike out encl. 71 against him being the former partner of the defendant.

[6] It was argued that (a) the fixed loan transaction was done before the appellant joined the defendant firm; (b) The appellant did not have any knowledge regarding the fixed loan transaction since it was handled by the Subang Jaya branch under Frankie Tan; (c) Frankie Tan's letter dated 30 January 2015 and the defendant's letter dated 9 February 2015 stated that the appellant was not liable for the judgment debt; (d) Paul Cheah's resignation from the firm on 1 August 2006 would invalidate the agreement; (e) Paul Cheah had induced the appellant to enter into the agreement by fraud and misrepresentation; (f) the plaintiff failed to comply with O. 77 r. 3(2) ROC 2012 since the cause papers were not served on the partners individually; (g) the partnership between Paul Cheah and the appellant was dissolved in June 2008; (h) the notice of demand was not served on the appellant before legal actions were commenced against the defendant; and (h) the plaintiff's claim was time barred.

Findings Of The High Court

[7] After hearing the parties, the learned High Court Judge allowed the application in encl. 71 and dismissed the application in encl. 91. The reasons can be summarised as follows (as set out in the headnotes of the reported case):

(a) The plaintiff did not sue the partners individually but sued the defendant firm of Paul Cheah & Associates. The appellant was a partner of the firm as at 1 November 2006, that is, the material date the plaintiff's charge was discharged. Hence, according to s. 12 of the Partnership Act 1961, the appellant was liable for the debts of the partnership.

(b) The defendant breached its contractual rights as the panel solicitors of the plaintiff when the defendant discharged the plaintiff's charge over the Polyidaman land. The cause of action only arose when the discharge by way of form 16N was registered and the charge on the plaintiff was discharged on 1 November 2006. When the discharge of the charge occurred on 1 November 2006, the appellant was a partner of the defendant firm. Thus, at the material date, all other partners of the defendant firm, including the appellant, were liable for the actions of Frankie Tan.

(c) The respective letters from Frankie Tan and the defendant stating that Frankie Tan and not the appellant was liable for the judgment debt could not exonerate the appellant as the court had to decide on this matter based on the evidence brought before it. In this regard, the trial judge had already held that all the partners of the defendant firm at the date of the discharge of the charge were liable.

(d) The agreement was not binding on the third party. The agreement was made between the appellant and the defendant firm and not between the appellant and Paul Cheah since the latter signed it on behalf of the defendant firm. In the circumstances, the appellant was liable for the liabilities of the firm to third parties. Since the defendant firm indemnified the appellant from any suits taken by third parties against the defendant in respect of any of the other branches of the defendant, by implication, the appellant was equally liable for those branches' liabilities to third parties.

(e) The fraudulent act committed by Frankie Tan did not absolve the other partners from liability as the object of the transaction was within the ordinary course of business of the firm. The actions of the fraudulent partner, though unlawful and illegal, were immaterial and s. 12 of the Partnership Act 1961 applied to render the defendant liable for those acts.

(f) A partnership can in fact and in law be sued as a firm. The plaintiff was not obliged to serve the statement of claim to the appellant since the cause papers were properly served on the firm. The partners were bound by the Partnership Act 1961 and were therefore liable for the liabilities against the firm. Since there was a final judgment against the defendant firm, all the partners at the relevant time were liable for the liability of the firm at that time, which includes the appellant. In the circumstances, there was no requirement for a demand since the causes of action of the plaintiff was for negligence, fraud and general breach of contract, unlike, for instance, a claim made under an on demand guarantee when a demand was a prerequisite to trigger a cause of action.

(g) The judgment against which the plaintiff sought leave to execute remained a good judgment until it was set aside. Further, the plaintiff's claim was not time barred since the judgment was obtained on 30 November 2012 and time bar would only set in on 30 November 2024. Once a judgment is obtained, on account of the doctrine of merger, the judgment replaces all antecedent causes of action. Pursuant to s. 6(3) of the Limitation Act 1953, the plaintiff has 12 years to enforce the judgment before it lapses.

The Instant Appeal

[8] Before us, the appellant raised several issues including new issues not raised before the High Court. After careful consideration we decided on the issues raised in the following fashion.

[9] The first issue raised was with regard to non-compliance with O. 77 r. 3(2) ROC 2012. It was contended that the learned judge had erred when using the date of 31 December 2013, which was the date of closure of Paul

Cheah & Associates, instead of using 30 June 2008 which was the date the appellant ceased to be a partner of the said firm in accordance with O. 77 r. 3(2) ROC 2012. Accordingly it was submitted that the writ of summons dated 25 January 2011 ought to have been served on the appellant.

[10] Now O.77 r. 3(2) states that "where a partnership has, to the knowledge of the plaintiff, been dissolved before an action against the firm is begun, the writ by which the action is begun must be served on every person within the jurisdiction sought to be made liable in the action". As found by the learned judge, although the appellant ceased to be a partner of the firm in June 2008, the firm itself was only dissolved in 2013. When the suit was filed by the plaintiff in 2011, the firm had entered appearance and defended itself at the trial.

[11] In this context we agree with the learned judge that O.77 r. 3(2) only applied when the firm was dissolved when its last two partners ceased to be partners on 31 December 2013. The argument that the term "partnership" in O. 77 must be distinguished from the term "firm" is without merit. The assertion that a partnership can be dissolved when one partner leaves the partnership or when a new partner joins the partnership is unsustainable.

[12] In *Millenium Medicare Services v. Nagadevan Mahalingam* [2013] 9 CLJ 766; [2013] 9 MLJ 873, the High Court held that the provisions of dissolution of a partnership found in ss. 34 - 37 of the Partnership Act 1961 do not cover a situation where a partner leaves a partnership and the other partners remain and the partnership continues. As such, the reliance on the old English case of *Wigram v. Cox, Sons Buckley & Co* (1894) QBD 792 is misplaced as our law on partnership is not merely common law but is governed by our own Partnership Act 1961. In any event, the English case relates to rules that vary significantly from our O. 77 r. 3(2) and for that reason is inapplicable to the instant appeal. The appellant's reliance on the old Singapore case of *Wee Wat Neo v. Chop Khoo Aik Seng & Co* [1908] SSLR 50 is, with respect, also misplaced as in that case the firm had been completely dissolved and the plaintiff had no knowledge of the dissolution before filing the suit. Needless to say, the facts there are different as in the present case the defendant firm was very much in existence. As alluded to earlier, that decision was long before the advent of the Partnership Act 1961.

[13] Secondly, it was argued that the learned judge had erred when she failed to direct that the liability of the appellant be tried in full to enable all matters in dispute to be decided based on O. 77 r. 5(5) ROC 2012 in respect of the following five issues:

(a) Did the plaintiff's cause of action arise when Polyidaman first took the original loan from the plaintiff and charged the property to the plaintiff in 2004 given that Frankie Tan was the partner of the Subang Jaya office of Paul Cheah & Associates who prepared the loan documentation and

A original charge, and if so, then would the appellant be liable for the same given that he only joined the firm's Port Klang office in July 2006 given s. 19(1) of the Partnership Act 1961;

(b) Can the appellant be liable since the judgment against Paul Cheah & Associates did not refer to the Port Klang office but only referred to
B the Subang Jaya and Kuala Lumpur offices of Paul Cheah & Associates;

(c) Since the plaintiff did not serve the writ on the appellant so that the appellant had the right to be heard during the trial against the firm, the appellant should be able to adduce evidence in his own defence under
C the *audi alteram partem rule*, natural justice and O. 77 r. 5(5);

(d) The appellant is not bound by *res judicata* by the judgment which only establishes liability against the firm; and

(e) The agreement between the defendant firm and Pacific and Orient Insurance Company Limited whereby the insurance company agreed to
D pay RM400,000 for the judgment obtained by the plaintiff.

[14] Now as pointed out by learned counsel for the plaintiff bank, this ground of appeal was a deviation from the original grounds raised to oppose the granting of leave before the High Court. In other words, the appellant had
E not argued before the High Court that his liability should be tried first under O. 77 r. 5(5) before leave to execute can be granted.

[15] In this regard, it is trite that as a general rule, a new point which was not raised in the court below should not be allowed to be raised and argued at the appellate stage (see *S Mariappan v. The Government Of Malaysia* [1983]
F 2 CLJ 124; [1983] CLJ (Rep) 382; [1983] 2 MLJ 340; *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 LNS 139; [1970] 1 MLJ 233; and *Lim Chui Lai v. Zeno Limited* [1964] 1 LNS 88; [1964] 30 MLJ 314).

[16] In any event, the relevant part of O. 77 r. 5(5) provides that "… where that person disputes liability, the court may order that the liability of
G that person be tried and determined in any manner in which any issue or question in any action may be tried and determined". This must be read together with O. 77 r. 1 and r 5(4). When read together we agree that O. 77 r. 5(4) is a secondary proceeding after judgment is taken against the firm, whereby the only thing that the applicant needs to show is that the subject
H of the application "is liable to satisfy the judgment or order as being a member of the firm".

[17] It must follow that the plaintiff does not need to prove all over again all the causes of action that are merged in the judgment against the firm because the nexus between the appellant and the judgment is the
I all-important fact that the appellant was a member of the firm at the time when the plaintiff's cause of action accrued against the firm. Thus, as soon as the plaintiff shows that the appellant was a member of the firm when the cause of action accrued, the appellant is liable.

[18] In this connection, the relevant question ought to be – when did the plaintiff's causes of action accrue against the firm? Without a doubt it must be when the plaintiff's charge was wrongfully discharged by the firm whereby it was presented to the land office by the firm and it was witnessed by a partner of the firm because before that date there was no injury nor wrong whatsoever done against the plaintiff. The date when its charge was discharged was clearly the date when the plaintiff suffered the loss of its interest, the charge, over the Polyidaman property. As a result its damage accrued on that same day.

[19] The date when the charge was discharged was identified as the date when the cause of action arose by the trial judge in the High Court suit. The learned judge in that case observed:

> The Court agrees with Counsel for the Plaintiff and holds that the Counsel for the Defendant is wholly wrong on his complaint. The Plaintiffs claim is not premised on whether the Sale and Purchase Agreement and the Memorandum of Transfer between Polyidaman and Shahrol and the Loan Agreement between Shahrol and CIMB are valid and binding but the cause of action is that the plaintiff has lost its security over the property due to the breaches of conduct and fraudulent acts of Frankie Tan (and of the Defendant) in causing the Plaintiff charge to be discharged and the Memorandum of Transfer and the CIMB charge to be registered without the property having been redeemed in the first instance. Everything was done without the knowledge of the Plaintiff and fraudulently behind its back ...

[20] Relying on the judgment of the High Court dated 30 November 2012 and the order of the Court of Appeal on 5 August 2013, it is beyond dispute that the invalid act of Frankie Tan in witnessing the forged signature on the Form 16N on 19 October 2006 as partner of the defendant firm and the defendant's action in presenting the executed Form 16N for registration on 1 November 2006 directly caused the discharge of the plaintiff's charge over the property. Therefore the relevant dates when the cause of action of the plaintiff arose against the defendant were 19 October 2006 and 1 November 2006. Since the appellant does not dispute that he was a partner on those dates, the prerequisites for leave as set out in O. 77 r. 5(4) have been satisfied and the appellant must accordingly be liable to the plaintiff for the judgment debt.

[21] In this regard as well, we agree that the cases cited by the appellant in support of his argument are not applicable. The case of *Lim Boon Kiak v. Affin Bank Bhd* [2013] 6 CLJ 579; [2014] 1 MLJ 439 relates to bad service of the creditor's petition on the judgment debtor under the Bankruptcy Rules 1969 whereas *Kumpolan Kemajuan Raya Sdn Bhd v. Faidz Darus* [1996] 1 BLJ 423; [1996] 5 MLJ 35 relates to the question of whether it was the High Court or the Sessions Court which had jurisdiction to hear the application for

leave to execute. The reliance on the House of Lords decision in *Union of India v. Manohar Lal Narang And Another* [1977] 2 All ER 348 is also of no assistance as that case concerns the statutory test to be applied to extradite someone under the Fugitive Offenders Act 1967 (UK) which would lead to the loss of a person's liberty. In short, and with respect, reliance on these cases is misplaced.

[22] Thirdly, it was argued that the plaintiff should exhaust all legal avenues to recover the debt by foreclosing the property before taking any other alternative action as the plaintiff had possession of the title and also indefeasibility of title. This argument, with respect, overlooks the crucial facts that the plaintiff could not proceed with foreclosure as the charge had been discharged as early as 1 November 2006, that the property was then transferred to a third party one Shahrol and the property was then charged by Shahrol to CIMB Bank on 1 November 2006. As such, this complaint was without merit.

Conclusion

[23] In the circumstances, and for the reasons we have given, we were of the view that the appeals were without merit. There was no error on the part of the High Court to warrant appellate interference. The appeals were therefore dismissed with costs. The orders of the High Court were affirmed. After hearing the parties, we fixed costs at RM5,000 for each appeal subject to payment of allocatur fees. We also ordered the deposits to be refunded to the appellant.